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Divorce--Condonation--Two Acts of Coition Plus Conciliatory Letter as Condonation for Cruelty

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CASE COMMENTS

DIVORCE — CONDONATION — TWO ACTS OF COITION PLUS CONCILIATORY LETTER AS CONDONATION FOR CRUELTY. — In her bill of complaint, a wife charged her husband with cruel and inhuman treatment under W. VA. CODE, c. 48, art. 2, §4 (Michie, 1943). The husband, in his answer, denied the alleged acts of cruelty and by way of confession and avoidance set forth the defense of condonation. After a separation as a result of alleged cruelty, the wife by a letter couched in strongly conciliatory language had expressed an unequivocal intent to forgive the cruelty, to resume marital relations with the husband, and to return to his abode. On two isolated occasions after the separation, the parties entered into voluntary acts of coition upon the husband's assurance that such action would not prevent or interfere with the wife obtaining a divorce. The wife did not return to the husband and there were no intervening acts of cruelty; the parties had no further relationship. The trial court granted the divorce. *Held,* one judge dissenting, that the husband was guilty of statutory cruel and inhuman treatment, and that the two voluntary acts of sexual intercourse were alone insufficient to condone the alleged cruelty, but that when considered with the wife's conciliatory letter, both together amounted to condonation and precluded the granting of the divorce. Decree reversed. *Miles v. Miles,* 48 S. E.2d 669 (W. Va. 1948).

In the case of adultery under CODE, c. 48, art. 2, § 14 (Michie, 1943), voluntary cohabitation of the parties after knowledge of the adultery is a complete bar to the divorce. A single voluntary act of sexual intercourse between the parties after knowledge constitutes condonation, especially as against the husband. *DeBerry v. DeBerry,* 115 W. Va. 604, 177 S. E. 440 (1934). As the court concedes in the instant case, the rule is different where the ground for divorce is other than adultery, *e. g.,* cruelty. *Schletewitz v. Schletewitz,* 193 P.2d 34 (Cal. App. 1948); *Hanniball v. Hanniball,* 18 N. J. Misc. 67, 10 A.2d 492 (1939); *Rushmore v. Rushmore,* 12 N. J. Misc. 575, 174 Atl. 469 (1934); *Nixon v. Nixon,* 329 Pa. 256, 198 Atl. 154 (1938).

The so-called voluntary acts of coition in the instant case were accomplished upon the husband's assurance that such conduct would not hinder the wife's later action for divorce. It is a well-established principle that any conduct which is relied on for con-

donation must be completely voluntary and not induced by fraud, trick, or artifice. *Huffine v. Huffine,* 74 N. E.2d 764 (Ohio Com. Pl. 1948). Here the assertions of the husband would seem to amount to fraud and would thus obviate the acts from being completely voluntary; even if he believed the assertions to be true, they might serve to estop him from urging the acts as condonation.

In *Norman v. Norman,* 88 W. Va. 640, 107 S. E. 407 (1921), the court held that in a suit for divorce from bed and board grounded upon cruel and inhuman treatment, the acts relied upon for condonation of such treatment "must evidence unequivocal intent to forgive the transactions complained of and to voluntarily resume marital relations." And again in *Currence v. Currence,* 123 W. Va. 599, 18 S. E.2d 656 (1941), the court held that the resumption of *full* marital relations by husband and wife alleged cruel and inhuman treatment operated as a condonation of such offense with the inference that nothing short of *full* resumption of martial relations would suffice. (Italics supplied.) A mere voluntary promise to forgive and to return and live with the husband is not sufficient to constitute condonation by the wife as it it must be followed by a restoration of the offending party to all marital rights. *Christensen v. Christensen,* 125 Me. 397, 134 Atl. 373 (1926); *Massie v. Massie,* 202 Iowa 1311, 210 N. W. 431 (1926); 2 BISHOP, MARRIAGE AND DIVORCE 36 (5th ed. 1873); see *Anderson v. Anderson,* 89 Neb. 570, 573, 131 N. W. 907, 908 (1911); *Wolff v. Wolff,* 102 Cal. 433, 535, 36 Pac. 767, 768 (1894). The writing of affectionate letters by the aggrieved spouse to the guilty one does not amount to condonation. *Lundy v. Lundy,* 23 Ariz. 213, 202 Pac. 809 (1922); *Forrester v. Forrester,* 101 Miss. 155, 57 So. 553 (1912); *Smith v. Smith,* 119 Cal. 183, 48 Pac. 730 (1897). Condonation is not as strict a bar against a wife as against a husband for the reason that she often submits through necessity and thus it is more readily presumed against the husband. *Glass v. Glass,* 175 Md. 693, 2 A.2d 443 (1938); *McLemore v. McLemore,* 285 S. W. 693 (Tex. Civ. App. 1926); *Dose v. Dose,* 198 Ill. App. 387 (1916). It is something more than forgiveness in the sense of ceasing to harbor resentment. It is not only a blotting out of the offense from the mind and heart of the person forgiving, but the restoration of the offender to his former position. See *Rushmore v. Rushmore, supra.*

Thus it seems that in order to constitute condonation there must ordinarily be a continuance or a revival of marital cohabita-

tion. *Elder v. Elder,* 139 Va. 19, 123 S. E. 369 (1924); *Greco v. Greco,* 121 Atl. 666 (Del. 1923). Contra: *Thompson v. Thompson,* 49 Nev. 375, 247 Pac. 545 (1926). Whether *Norman v. Norman, supra,* so holds is not quite clear from the opinion but such would seem to be the law, from the inference in *Currence v. Currence, supra.* In *Myers v. Myers,* 127 W. Va. 551, 33 S. E.2d 897 (1945), an attempt at reconciliation was made consisting of husband and wife kissing each other and going to bed together after a quarrel. The court held that such conduct did not amount to a condonation or reconciliation of differences between the parties as respects the wife's right to a divorce on the ground of cruel and inhuman treatment. From the above authorities it would seem that something more than a mere intent to forgive and isolated acts of coition would be necessary to constitute condonation.

It is said that condonation as an affirmative defense is favored by the law. *Brown v. Brown,* 51 R. I. 132, 134, 152 Atl. 423 (1930). But in divorce cases where a determination is made by the trial court upon the evidence, the findings of the trial chancellor should be given great weight, *Maxwell v. Maxwell,* 75 W. Va. 521, 84 S. E. 25 (1915); here, the trial court refused to find condonation. As was pointed out in the dissenting opinion of Judge Kenna in the instant case, "If condonation is to become the likely result of unsuccessful efforts to become reconciled, it is certain that the person whose rights have been injured will be extremely apprehensive of the slightest gesture that might result in surrendering a legal right to relief. It will result in fewer, not more reconciliations." The authorities and the more nearly analogous cases seem to support the dissent.

J. F. S., Jr.

EVIDENCE — ADMISSIBILITY OF INDICTMENTS IN CIVIL CASES IN FEDERAL COURTS.—*A* and *B* were jointly sued for the conversion of money. They introduced evidence of their general good character. They objected to the introduction of testimony by the plaintiff that they had had been jointly indicted for an earlier crime, receiving stolen property, in 1931 and 1933. On both occasions *A* pleaded guilty and was sentenced. No further proceedings, beyond the indictment, were taken against *B* as to the 1931 indictment; but he pleaded guilty to the 1933 indictment and later was permitted to withdraw his plea and the case as to him was dropped. The trial